

# **Collective Punishments under International Humanitarian Law: An Analysis of the 2006 War in Lebanon**

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*If the soldiers are not returned we will turn Lebanon clock back twenty years*  
Israel's Chief of Staff, Lt. Gen. Dan Halutz

*The claim that we lost is unfounded. Half of Lebanon is destroyed; is that a loss?*  
Israeli PM Ehoud Olmert

## **Introduction**

This article deals with the case of collective punishments and some issues closely related to it, namely the issues of collective responsibility and that of reprisals. The idea is to use the lenses of the International Humanitarian Law (IHL) in order to clarify these concepts which very often lead to legal misconceptions that too easily and deliberately are used to provide political arguments and justifications. The case of the 2006 war in Lebanon will serve as a case study in order to explore the use of these tactics in the reality of the international politics and thus test some of the initial remarks. Concerning the war in Lebanon it should be noted in advance that this study will examine the situation under the IHL (*jus in bello*) parameters, and not under the human rights law, and consciously leaving aside many relevant international law issues, like the legality of use of force, aggression, individual criminal responsibility, etc.; this by no means imply that such issues were not raised during this war.

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## **1. The Prohibition of Collective Punishment under the IHL**

### **1.1. From The Hague to Geneva. Towards the Individual Responsibility**

In general, the prohibition against collective punishments aims

to protect persons from punishments for acts they have not personally committed and also to prevent future reprisals against the protected persons<sup>1</sup>. The prohibition of collective punishment (or collective penalties) can be traced back to the 1907 Hague Regulations. According to Article 50 of the Regulations:

No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible<sup>2</sup>.

From this article it is clear that the responsibility should be regarded as strictly individual and cannot be placed upon the shoulders of the entire population<sup>3</sup>. The provision's importance does not rely merely on its historical significance. According to the International Committee of the Red Cross the provisions of the Hague Conventions of 1899 and 1907 are considered customary international law. As such they are also binding on states which are not parties to them<sup>4</sup>. Moreover, even though incomplete, the notion of individual responsibility is inserted into IHL through this article. It will also be the spawning provision for the further expansion of the prohibition prescribed in it.

## 1.2. The Additional Protocols and the Idea of Collective Responsibility

In the II Additional Protocol to the four Geneva Conventions of 1977 the prohibition of collective punishments is reaffirmed and expanded. The prohibition is prescribed in Article 4 para. 2(b) and declaratory of the drafters intention to boost the prohibition is the fact that it is listed under the fundamental guarantees included in the Protocol. According to the ICRC Commentary the final placement of the prohibition among the fundamental guarantees is important because it shows the clear intention to avoid any risk of a restrictive interpretation. Moreover, the prohibition includes not only the judicial penalties but also any kind of punishment, and outlaws all reprisals against protected persons<sup>5</sup>. Additionally, the article is directly deriving from Article 33 of the IV Geneva Convention, which means that the spirit and aims of the article were upheld and expanded to become a fundamental

<sup>1</sup> P. Perraki, *The Minimum Protection of Persons during the Non-Armed Conflicts*, in S. Perrakis (ed.), *The New International Humanitarian Law of Armed Conflict, The Geneva Protocols of 1977*, N. Sakkoulas, Athens, 1989, p. 67.

<sup>2</sup> *Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land*, The Hague, 18 October 1907, Article 50.

<sup>3</sup> R. Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2002, p. 188.

<sup>4</sup> ICRC, *Commentary on Convention (IV) Respecting the Laws and Customs of War on Land*, cit.

<sup>5</sup> The effort by the ICRC to make the prohibition as wide as possible was successful. The ICRC Commentary is revealing: «The concept of collective punishment was discussed at great length. It should be understood in its widest sense, and concerns not only penalties imposed in the normal judicial process, but also any other kind of sanction (such as confiscation of property) as the ICRC had originally intended». ICRC, *Commentary on Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*.

guarantee<sup>6</sup>. The fact that the II Additional Protocol is limited to the non-international conflicts does not negate the trend to include the prohibition among the fundamental principles of IHL.

A concept that could lead to the justification and legalization of collective punishments is the idea of the collective responsibility of a group or even a nation. This would be the case when a group or a population as a whole bears the (collective) responsibility for acts of an individual or a group of individuals and thus is the legitimate target of collective punishment through reprisals. One of the few judicial reviews of the issue was given in the *Ardeatine Caves case*<sup>7</sup> concerning the killing by the way of reprisals against innocent civilians in Rome in 1944. The Italian Military Tribunal in its judgment of 1948 took an expansive view of the notion of collective responsibility in order to conclude that collective punishment could be permissible, a view however that is in total contradiction with the humanitarian values and many principles of IHL described above, and in obvious contrast with Article 50 of the 1907 Hague Regulations, applicable at that time. The decision received justified criticism<sup>8</sup>. Today, in the light of the Geneva Conventions and the Additional Protocols, the idea of collective punishments due to any kind of collective responsibility appears to be out of any legal and moral basis.

### 1.3. The Prohibition of Collective Punishments

Under the 1949 Geneva Conventions, collective punishments are a war crime too. The most pronounced article in International Humanitarian Law concerning the collective penalties is probably Article 33 of the IV Geneva Convention relative to the protection of civilian persons in time of war. In this article we read that:

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited.

Reprisals against protected persons and their property are prohibited<sup>9</sup>.

According to the Commentary of the ICRC, Article 33 derives

<sup>6</sup> P. Perraki, *The Minimum Protection of Persons...*, cit., p. 67; see also the ICRC, *Commentary on Protocol Additional to the Geneva Conventions...*, cit.

<sup>7</sup> Italian Military Tribunal, Rome, cases nos. 471/478, 1948, and also British Military Court, Venice, case no. 44, 1947.

<sup>8</sup> See R. Provost, *International Human Rights and Humanitarian Law*, cit., p. 191.

<sup>9</sup> *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949, Part III: *Status and Treatment of Protected Persons*, Article 33.

directly from Article 50 of The Hague Regulations. The article very clearly prohibits any collective penalty and is a step forward towards the establishment of the individual responsibility during war time. In other words, and similar to the domestic law principle, the responsibility is individual and cannot be dispersed among groups of persons. Therefore, a big step forward has been made, as the Article 50 of The Hague Regulations «could be interpreted as not expressly ruling out the idea that the community might bear at least a passive responsibility», an interpretation no longer possible under Article 33<sup>10</sup>.

In the second paragraph collective punishments are linked with «other measures of intimidation or of terrorism» in a clear illustration of the effort to outlaw the practices of states who resort to collective punishment hoping that they will manage to minimize hostile acts against them. The drafters of the Geneva Conventions had in mind the reprisal killings of WWI and WWII<sup>11</sup>. In WWI, Germans executed Belgian villagers in mass retribution for resistance activity. In WWII, the Nazis carried out many forms of collective punishments to suppress and deter any resistance. Entire villages or towns or districts were held responsible for any resistance activity taking place in the territory and in some cases entire villages were «executed to death»<sup>12</sup>. The spirit of the provision follows the historical memory and this is also evident in the relevant Commentary of the ICRC, according to which such measures:

<sup>10</sup> ICRC, *Commentary on the Geneva Conventions of 12 August 1949*, vol. IV, p. 225.

<sup>11</sup> D. Kuttab, *Collective Punishment*, in R. Gutman, D. Rieff, A. Dworkin (eds.), *Crimes of War 2.0: What the Public Should Know*, W.W. Norton, New York, 2007, pp. 89-91.

<sup>12</sup> One of the most striking incidents was the destruction of the village and the massacre of the inhabitants of the Greek village of Distomo in 1944 by the SS in retaliation to Greek resistance activities in the region. See *German Supreme Court: Distomo Massacre Case*, BGH - III ZR 245/98 (2003).

<sup>13</sup> ICRC, *Commentary on the Geneva Conventions of 12 August 1949*, vol. IV, cit., p. 226.

<sup>14</sup> *Ibidem*, p. 225.

strike at guilty and innocent alike. They are opposed to all principles based on humanity and justice and it is for that reason that the prohibition of collective penalties is followed formally by the prohibition of all measures of intimidation or terrorism with regard to protected persons, wherever they may be<sup>13</sup>.

It is clear the view of the Red Cross that such methods of warfare are clearly against the most basic principles of humanity and should be eliminated by any means possible. Thus, it is no surprise that the final wording of the article is almost identical to the draft proposed by the International Committee of the Red Cross and was adopted unanimously<sup>14</sup>.

#### 1.4. Collective Punishment in Non International Armed Conflicts

Concerning the situations of internal armed conflict the reality reveals that the issue is not covered to the same extent: the only specifically relevant rule is the provision in common Article 3 which prohibits the taking of hostages (and, afortiori, the wanton execution of such persons). The general principle of common Article 3 requiring humane treatment for all persons taking no active part in the hostilities, and the specific prohibitions of «violence to life and person provide the remaining solid ground to hold retaliatory acts of the type dealt with here, not only utterly despicable, but unlawful»<sup>15</sup>.

However, recent case law of the Special Court of Sierra Leone confirms the application of the prohibition of collective punishment in internal conflicts. A ruling of the Court issued in February 2008 convicts some accused individuals for the use of collective punishment against civilians and grounds its decision on the prohibition prescribed in the II Additional Protocol, Article 4, para. 2(b)<sup>16</sup>.

#### 1.5. Reprisals and Collective Punishment

The last part of Article 33 deals with the concept of reprisals and explicitly forbids the reprisals against protected persons and their property. This is no surprise here either, as the concept of reprisals is closely linked to that of collective punishment and the confusion between collective punishments and reprisals is probably to blame for the mistaken perception that reprisals are punitive measures<sup>17</sup>.

Even though the concept of belligerent reprisals goes beyond the scope of this paper, some notes are important. Nowadays reprisals against protected persons and property are expressly prohibited in the four Geneva Conventions of 1949 and in the Hague Convention of 1954 on cultural property<sup>18</sup>. The long standing debate within the international community ended with a piecemeal solution whereby belligerent reprisals were completely prohibited towards protected persons and objects. The reprisals against prisoners of war were outlawed in Article 2 of the 1929 Geneva Convention and the principle was later reaffirmed in the 1949 Geneva Conventions (arts. 46/47/13/33). Moreover, in the I Additional Protocol of 1977, almost all belligerent reprisals are banned (among others in Articles

<sup>15</sup> F. Kalshoven, L. Zegveld, *Constraints on the Waging of War, An Introduction to International Humanitarian Law*, ICRC, Geneva, 2001, p. 79.

<sup>16</sup> Special Court of Sierra Leone, Appeals Chamber, *Prosecutor v. Brima, Kamara, and Kanu*, case no. SCSL-2004-16-A, 22 February 2008; see also C. Jalloh, J. Osei-Tutu, *Prosecutor v. Brima, Kamara, and Kanu: First Judgment from the Appeals Chamber of the Special Court for Sierra Leone*, in «ASIL Insights», vol. 12, no. 10, May 20, 2008, available at <http://www.asil.org/insights080520.cfm>.

<sup>17</sup> R. Provost, *International Human Rights and Humanitarian Law*, cit., p. 188.

<sup>18</sup> F. Kalshoven, L. Zegveld, *Constraints on the Waging of War...*, cit., p. 76.

20/51(6)/52(1)) even though according to many scholars the prohibition is not realistic and «is a religious tenet rather than a serious military or political proposition [...] what is likely to happen is that Article 51, para. 6, will remain a dead letter»<sup>19</sup>. According to the latter view, in theory reprisals should still retain their punitive nature and this is also what happens in reality. Their purpose should be to punish the perpetrator of the violation of the law of war and to deter future violations. In practice, however, the reality is different. It is highly improbable that the original violator will be located and punished through reprisals in a situation of armed conflict. What happens instead is that under the presumption that a group or even a whole civilian population was somewhat in allegiance or helped the responsible, the most vulnerable groups are targeted and suffer from the reprisals, an action which often results to a high toll of civilian casualties and destruction of property and infrastructure. Therefore, to construe reprisals as a punishment against protected persons and objects «[...] would amount to collective punishment for the wrong committed by others, despite the absence of any demonstrated active or passive responsibility on the part of the target of the reprisals. It is to adopt a formal view of the state, or even a country, as a whole as the author of the initial violation»<sup>20</sup>.

The above discussed case would run directly contrary to the total prohibition laid down in Article 33 of the IV Geneva Convention and to the customary rule stemmed from Article 50 of the 1907 Hague Regulations. Moreover, reprisals as punishment are inconsistent with the customary rule that they should end as soon as the violation is over<sup>21</sup>.

### 1.6. Collective Punishment: International Customary Law and the Interplay with the Human Rights Law

The prohibition of collective punishments, as described above, reveals a trend of expanding the scope of humanitarian protection. The importance of the prohibition is underlined by the fact that in the recent study of the ICRC concerning customary IHL, the customary nature of the prohibition of collective punishments is reaffirmed (both for international and non-international conflicts) and is listed among the fundamental guarantees for civilians and persons *hors de*

<sup>19</sup> Y. Dinstein, *Comments on Protocol I*, in «International Review of the Red Cross», no. 320, October 1997, pp. 515-519 and *passim*. For the arguments presented during the drafting of the two additional protocols by those in favor of the reprisals against at least civilian objects see F. Kalshoven, L. Zegveld, *Constraints on the Waging of War...*, cit., pp. 143-145.

<sup>20</sup> R. Provost, *International Human Rights and Humanitarian Law*, cit., p. 187.

<sup>21</sup> *Ibidem*, p. 188, see also F. Kalshoven, *Belligerent Reprisals*, Brill Academic Publishers, Leiden, 2005.

*combat* (Rule 103)<sup>22</sup>. The significance of the rule is acknowledged also by the United Nations. The prohibition of collective punishment is incorporated in the humanitarian law rules that should be unconditionally respected by the UN forces<sup>23</sup>.

The importance of the article does not end here. The issue of collective punishment has many aspects and goes beyond the law of armed conflicts. Article 33 is a good example of the interlink between IHL and human rights law, making hard the distinction between the two<sup>24</sup>. The first sentence of the article is characteristic of human rights terminology, while the second one refers to groups of people and possibly the entire civilian population, using traditional IHL language. According to Yoram Dinstein: «The existence of dual rights (a state right and an individual human right) corresponding to a single obligation devolving on the enemy state, is conducive to a better protection regime»<sup>25</sup>.

Based on the evidence presented, one could argue that the prohibition of collective punishment is a firmly established rule of IHL, while some aspects of it touch also human rights law. The norm is inspired by fundamental humanitarian values and rooted both in conventional and customary international law. However, taken into account the poor judicial review of the issue, the tricky aspect remains: how to qualify a practice as collective punishment?

The answer would be less complicated if the fundamental humanitarian principles were not ignored and the well being and protection of the people under conflict situation was always held as the guiding principle. Therefore, the effort should be to provide the protected persons and objects with the maximum possible protection, and in line with the ICRC views, the scope of application of the prohibition should be as wide as possible. The latter view is crucial, as throughout the history, the practice of collective punishments has been proven to affect almost exclusively the most vulnerable parts of the population and their indispensable assets in order to survive in humane conditions.

### 1.7. The Applicability of Article 33 of the IV Geneva Convention in the 2006 War in Lebanon

The first article that prohibits the collective punishments and

<sup>22</sup> J.M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*, 2 vols., ICRC, Cambridge University Press, Geneva, 2005, vol. I, p. 379 (hereafter: ICRC Study).

<sup>23</sup> United Nations, Secretary-General's Bulletin «*Observance by United Nations forces of international humanitarian law*», 6 August 1999, UN Doc. ST/SGB/1999/13.

<sup>24</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, p. 21.

<sup>25</sup> *Ibidem*.

is relevant to the 2006 war in Lebanon is Article 50 of the 1907 Hague Regulations, a norm having acquired the status of international customary law and thus binding Israel in any case. However, the article has two «flaws». The major one is that it leaves some room for «passive collective responsibility» of groups and thus in a very wide interpretation can justify collective punishments. Even though this view is not acceptable anymore<sup>26</sup>, it shows the incomplete character of this article, which is its second flaw. The provision seems somehow weaker compared to the prohibition prescribed in Article 33 of the IV Geneva Convention of 1949. This by no means implies that the prohibition of Article 50 is not concrete enough to cover the situation, but it is true that the provision of the IV Geneva Convention is taking into account all the aspects of the issue (including the issues of collective responsibility and reprisals) and does not allow room for any quarrel as it clearly sets the responsibility on an individual basis.

The legal question that needs to be answered before applying Article 33 on the Lebanon war is whether the people of Lebanon were protected persons according to the scope of the IV Convention. In other words, were the Lebanese people affected by the Israeli conduct under Israel's power as demanded by the Article 4 of the IV Geneva Convention?<sup>27</sup> In order for Article 33 to be applicable to the whole Lebanese civilian population a broad interpretation of Article 4 has to be taken.

Indeed, the Commentary of the ICRC to Article 33 affirms that «[its prescription] should be understood in its widest sense»<sup>28</sup>, thus advocating for the maximum protection of civilian population. Moreover, in the lack of any more recent treaty law provision concerning the issue, the relevant state practice is critical in determining the scope of the norm. So, in the ICRC Study on customary law, we find that there is enough state practice to back up such wide interpretation and thus the relevant article should be considered as protecting the whole civilian population from collective punishments<sup>29</sup>. The prohibition of collective punishments, as described above, should therefore apply to the summer 2006 conflict between Israel and Lebanon. The same position was held also by the Commission of Inquiry on Lebanon, as it included this article in the legal principles concerning the protection of civilian

<sup>26</sup> See the relevant analysis above.

<sup>27</sup> Article 4 Geneva Convention IV provides that: «Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals».

<sup>28</sup> ICRC, *Commentary on Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, cit., available at <http://www.icrc.org/ihl.nsf/COM/380-600038?OpenDocument> (visited on 28 April 2008).

<sup>29</sup> ICRC Study, chapter 32, p. 2500.

<sup>30</sup> United Nations, General Assembly, *Report of the Commission of Inquiry on Lebanon*, UN Doc. A/HRC/3/2, 23 November 2006, para. 88, p. 28.

<sup>31</sup> United Nations, General Assembly, A/HRC/2/7, 2 October 2006, p. 8, also J. Somer, *Acts of Non-State Armed Groups and the Law Governing Armed Conflict*, in «ASIL Insights», vol. 10, no. 21, August 2006, available at <http://www.asil.org/insights/2006/08/insights060824.html> (visited on 11 May 2008).

<sup>32</sup> This is a newly found term used by some scholars to describe complex situations like the one under review here. Even if conflicts blending non-international and international elements arise very often, the term has not found its way on treaty or other law. See J. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, in «International Review of Red Cross», vol. 85, no. 850, June 2003, *passim*.

<sup>33</sup> United Nations, General Assembly, *Report of the Commission of Inquiry on Lebanon*, cit., para. 53. See also D. Turns, *Some reflections on the Conflict in Southern Lebanon: The «Qana Incident» and International Humanitarian Law*, in «Journal of Conflict and Security Law», vol. 5 (2), 2000, p. 192.

<sup>34</sup> For example see K. Anderson, *Is the Israel Hezbollah Conflict an International Conflict?*, available at <http://kennethandersonlawofwar.blogspot.com> (visited on 12 May 2008), and also J. Somer, *Acts of Non-State Armed Groups...*, cit.

<sup>35</sup> International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, and *International Court of Justice, United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment of 24 May 1980.

<sup>36</sup> *Prosecutor v. Tadić* (Jurisdiction), ICTY, 1995.

population to be applied<sup>30</sup>. A question remains as to whether the conduct of Israel during that war can be qualified as collective punishment.

## 2. The 2006 War in Lebanon

### 2.1. The Nature of the Conflict

The trickiest question is probably that concerning the nature of the conflict under IHL. There are some elements complicating the situation and this complexity has been acknowledged often<sup>31</sup>. The war in Lebanon was not a traditional international conflict as described by the international law, but involved states as well as non-state actors, a situation which some has described as «internationalized» armed conflict<sup>32</sup>. When the Geneva Conventions speak about international conflicts they refer to conflicts among high contracting parties but it is a well established fact that the Lebanon forces, even though their assets were under attack numerous times, did not participate in the conflict, not actively at least<sup>33</sup>. The problem concerning Lebanon might arise from the fact that Hezbollah is not a party to the Conventions, a state neither, of course, and therefore some doubts arise as to whether the conflict can be qualified as an international one. In this case the question is whether the acts of an armed non-state group, Hezbollah, can be attributed to the state of Lebanon<sup>34</sup>. Therefore, the view taken upon the nature of Hezbollah is beyond doubt important.

Concerning the attribution of the acts of Hezbollah to the Lebanese state, a lot can be said. The classic case-law concerning the state responsibility for acts of non-state actors comes from the ICJ's *Nicaragua* and *Iranian hostages* judgments<sup>35</sup>. While these judgments require full and effective state control over the non-state actors (including not only the financing but also training, equipping, as well as the active participation in the targeting and planning process), more recently in the *Tadić case* the ICTY relaxed the standards, although still requiring effective control of the groups (including also the participation in the planning of military operations and going beyond the mere financing of the operation)<sup>36</sup>. Another way of attributing the acts of non-state

37 J. Somer, *Acts of Non-State Armed Groups...*, cit.

38 *Ibidem*.

39 Israeli Special Cabinet Press Release, *Hizbullah Attack*, 12 July 2006; see also *Fatal Strikes, Israel's Indiscriminate Attacks Against Civilians in Lebanon*, in «Human Rights Watch», vol. 18, 2006, available at <http://www.hrw.org/reports/2006/lebanon0806/>, p. 43.

40 Israeli Ministry of Foreign Affairs, *Iranian Complicity in the Present Lebanese Crisis*, July-August 2006, available at [www.mfa.gov.il](http://www.mfa.gov.il); for statements of Israeli officials see [www.msnbc.msn.com/id/13875121/](http://www.msnbc.msn.com/id/13875121/).

41 Israeli Ministry of Foreign Affairs, *Preserving Humanitarian Principles While Combating Terrorism: Israel's Struggle with Hizbullah in the Lebanon War*, in «Diplomatic Notes», no. 1, 2007, available at [www.mfa.gov.il](http://www.mfa.gov.il).

42 Whenever officials and politicians in oral statements, or documents and manuals, refer to Hezbollah they refer to it as a terrorist group, while Hezbollah considers itself primarily a movement against Israeli occupation.

43 D. Turns, *Some Reflections on the Conflict in Southern Lebanon: The «Qana Incident» and International Humanitarian Law*, in «Journal of Conflict and Security Law», vol. 5(2), 2006, p. 192.

44 Letter of the Permanent Mission of Lebanon to the UN Addressed to the Secretary General and the Security Council, A/60/938, 2006; see also United Nations, General Assembly, *Report of the Commission of Inquiry on Lebanon*, cit., para. 54.

45 See for example statements from the President of Lebanon Emil Lahoudin his interview on *Hezbollah Freed Our Country*, in «Der Spiegel Magazine», 25 July 2006, available at <http://www.spiegel.de/international/o,1518,428391,00.html> (last visited on May 2008).

actors to a state is by *ex-post facto* attribution, where a state acknowledges and adopts the actions of the non-state actor after they have been committed<sup>37</sup>. Some also suggest that especially in the post-September 11 era, due diligence by states to prevent terrorist groups from launching such activities from their soil, or from just harboring such groups, also grants a legally valid pretext from the attacked state to act on self-defense and take action against that state<sup>38</sup>.

## 2.2. The Qualification of the Conflict

The framework drawn above is important because it will help qualifying the conflict. Israel has in numerous occasions stated that it considers itself responding to the acts of the state of Lebanon, not just Hezbollah, implying therefore that it attributes the acts of Hezbollah to the state of Lebanon<sup>39</sup>. The Lebanese state is held accountable for either due diligence or for not having the will or power to prevent Hezbollah to use Lebanese soil to attack Israel. It should be also noted that Israeli officials have often made allegations that the organization is driven by other states, namely Syria and especially Iran<sup>40</sup>, and thus consider these states co-responsible with Lebanon. It is clear that as far as Israel is concerned, the conflict is an international one and this has been reaffirmed in direct and indirect ways. For example, when Israel justifies its conduct it always applies and refers to the principles governing conflicts of international nature<sup>41</sup>, even though it is true that Israel considers Hezbollah nothing more than a terrorist group<sup>42</sup>.

Many suggest that the nature of the conflict may depend upon the view taken upon Hezbollah and the attribution of its acts to the Lebanese state<sup>43</sup>. The state of Lebanon, through his Prime Minister and other officials, at the UN and in other occasions, has declared that it does not endorse Hezbollah's acts and it is not responsible for the attack carried out against the Israeli soldiers which led to the capture of the two militaries, the episode triggering the armed response of Israel<sup>44</sup>. Nevertheless, many high ranking Lebanese officials have acknowledged and honored the role of Hezbollah during the war with Israel, regarding the organization as a resistance to the Israeli invasion<sup>45</sup>.

In any case, the Lebanese government has never exercised any effective control on Hezbollah, and the latter has had for long

time some form of *de facto* authority especially in the Southern Lebanon, a fact often acknowledged, but not endorsed, even at international level. This was indeed the rationale behind the resolution 1559 (2004) of the UN Security Council, calling for disarmament of the organization and the respect of the exclusive authority of the Government of Lebanon throughout the country, and stating that the Security Council «Supports the extension of the control of the Government of Lebanon over all Lebanese territory». The same rationale is behind other resolutions, before and after the 2006 conflict<sup>46</sup>. Moreover, Hezbollah is a political party represented in the Lebanese Parliament, has ministers in the Cabinet and it is beyond any objection a central actor in the Lebanese political scene.

Concerning the issue of whether Hezbollah is a resistance or not, the Commission of Inquiry on Lebanon has expressed a clear view by noting that:

in its military expression and in the light of International Humanitarian Law, Hezbollah constitutes an armed group, a militia, whose conduct and operations enter into the field of application of article 4 para. 2 (b), of the Third Geneva Convention [...]. Seen from inside of Lebanon and in the absence of the regular Lebanese armed forces in South of Lebanon, Hezbollah constituted and is an expression of the resistance («mukawamah») for the defense of the territory partly occupied<sup>47</sup>.

The above arguments are enough to establish a link between Hezbollah and the Lebanese state as well as the *de facto* authority of the first to the South of Lebanon, which was the main theater of the summer 2006 war. However, according to the principles on state responsibility developed by the International Law Commission in 2001, the acts of Hezbollah cannot be *de jure* attributed to the Lebanese state, as the fighters of Hezbollah at the time of the conflict could not be considered as formal organs of the state of Lebanon<sup>48</sup>. Under the same principles the *de facto* attribution is not possible either<sup>49</sup>. The Lebanese government had no authority over the Hezbollah fighters at that time and this was illustrated in the Security Council's resolutions demanding from Lebanon to exercise its authority over the territory controlled by Hezbollah<sup>50</sup>. From a legal point of view, the latter argument,

<sup>46</sup> United Nations, Security Council, SC/8723 Resolution 1680, 17 May 2006, and United Nations, Security Council, SC/9040, 11 June 2007.

<sup>47</sup> United Nations, General Assembly, *Report of the Commission of Inquiry on Lebanon*, cit., para. 57.

<sup>48</sup> According to International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, Article 4, which is also codifying customary rules.

<sup>49</sup> *Ibidem*, Article 5.

<sup>50</sup> See *supra* note 22.

denying the *de facto* attribution of the acts of Hezbollah to the Lebanese state, could be the answer to the Israeli claims that hold the Lebanese state responsible for due diligence<sup>51</sup>.

The mere fact that the Lebanese armed forces did not take part in the conflict does not mean that the conflict was not an international one<sup>52</sup>. On the contrary, in the light of the previous argumentation, and the recent general trend in IHL toward conforming the law of non-international armed conflict to the more protective regime of the international armed conflict<sup>53</sup>, the international character of the conflict seems firmly established. This view was further reinforced by Israel's position, one of the parties to the conflict, which considers the state of Lebanon as its adversary and the whole Lebanese territory as a legitimate target. In the 12th of July, right after the abduction of the two Israeli soldiers, Prime Minister Olmert left no doubt about it:

This morning's events – he stated – were not a terrorist attack, but the action of a sovereign state that attacked Israel for no reason and without provocation. The Lebanese government, of which Hezbollah is a member, is trying to undermine regional stability. Lebanon is responsible and Lebanon will bear the consequences of its actions<sup>54</sup>.

Moreover, it should be noted that the Geneva Conventions, in view of the common Article 2, apply to situations where one state occupies part of the territory of another, even if there is no resistance. In addition, the view adopted by the «Human Rights Watch» in its in depth report concerning the issue, qualifies the conflict as international<sup>55</sup>. HRW grounds its qualification on the fact that Israeli forces, when engaging with the enemy were crossing the internationally recognized boundaries of the state of Lebanon and also to the fact that Israel occupied part of Lebanese territory. Other commentators, and under the light of the Article 4 of the IV Geneva Convention, have pointed out that when captured the combatants were in the hands of a power of which they were not nationals<sup>56</sup>.

After all as it was proven in the *Tadic case*, non-international armed conflicts can co-exist alongside the international ones<sup>57</sup>. In conclusion, notwithstanding the fact that Hezbollah is not a state and that the fighting did take place among it and the

<sup>51</sup> For a comprehensive analysis arguing against the attribution of any kind of the acts of Hezbollah to the Lebanese state see also A. Zimmerman, *The Second Lebanon War: Jus ad Bellum, Jus in Bello and the Issue of Proportionality*, in *Max Planck Yearbook of United Nations Law*, vol. 11 (2007), pp. 110-121.

<sup>52</sup> United Nations, General Assembly, *Report of the Commission of Inquiry on Lebanon*, cit., para. 55, see also D. Turns, *Some Reflections on the Conflict in Southern Lebanon...*, cit., p. 194.

<sup>53</sup> J. Stewart, *Towards a Single Definition of Armed Conflict...*, cit., p. 349, also J. Somer, *Acts of Non-State Armed Groups...*, cit.

<sup>54</sup> Statement available at <http://www.mfa.gov.il>. See also the statement of the Head of Israel's Northern Command Maj. Gen. Udi Adam, *This Affair is between Israel and the State of Lebanon, Where to Attack? Once it is Inside Lebanon, Everything is Legitimate - Not Just Southern Lebanon, Not Just the Line of Hezbollah Posts*, available at <http://www.cnn.com/2006/WORLD/meast/07/12/mideast/> (consulted on 3 May 2008).

<sup>55</sup> *Why They Died, Civilian Casualties in Lebanon During the 2006 War*, in «Human Rights Watch», vol. 19, no. 5(E), September 2007, available at <http://hrw.org/reports/2007/lebanon0907>, p. 31.

<sup>56</sup> D. Turns, *Some Reflections on the Conflict in Southern Lebanon...*, cit., p. 193.

<sup>57</sup> ICJ, *The Prosecutor v. Dusko Tadic*, case no. IT-94-1-R Appeals Chamber, 15 July 1999, para. 84.

Israeli army and not between the Israeli and the Lebanese armed forces, one can argue that the conflict was *generally* of international nature, even though variations concerning the applicable law arise with regard to the actors. Therefore, a non-international conflict (Israel-Hezbollah) existed alongside the international one (Israel-Lebanon), and thus the obligations vary according to the applicable law, which depends on the nature of the adversaries. Finally, as parties to the conflict should be regarded the state of Israel, the state of Lebanon, and Hezbollah.

### 2.3. The Conduct of Hostilities by the IDF

The aim of the following pages is to give an overview of the alleged violations of IHL during the 2006 war in Lebanon. The focus will be on the facts which can sustain the original assumption that Israel was making a conscious use of collective punishments. The allegations of war crimes committed by Hezbollah will be explored only as far as they impinged on Israel's conduct. This however, by no means implies that there were no war crimes attributable to Hezbollah or that their crimes are given lower value. Many NGO reports that are used in this research have dealt extensively with the issue and have documented such violations<sup>58</sup>.

#### *Attacks on Civilians and Civilian Houses*

One of the main criticisms against Israel during this war was that it repeatedly failed to take all the appropriate measures and precautions to minimize the casualties among the civilian population. There are many documented incidents where fleeing civilians were under direct fire. All available reports agree that civilian convoys have been repeatedly under attack and that it was impossible that the Israeli Defence Force (IDF) could not recognize those convoys as illegitimate military targets<sup>59</sup>. The main justification Israel gave for the attacks, was that Hezbollah fighters systematically meddled with civilians and that they used civilians as shields<sup>60</sup>. According to the findings of the NGOs and the Commission of Inquiry, Hezbollah did not use systematically the tactic of «human shields»<sup>61</sup>. In the view of the Commission of Inquiry the few cases in which this actually happened, by no means can justify the deliberate and systematic targeting of civilians. In addition,

<sup>58</sup> See for example *Civilians under Assault. Hezbollah's Rocket Attacks on Israel in the 2006 War*, in «Human Rights Watch», vol. 20, no. 2(E), February 2008, and Amnesty International, *Israel/Lebanon: Hizbullah's Attacks on Northern Israel*, MDE 02/025/2006, 14 September 2006. It is a disappointing fact that the Commission of Inquiry on Lebanon was not given the mandate to document the Hezbollah conduct as extensively and comprehensively as the Israeli one. At the time that this article was concluded the International Commission of Jurists have set up a commission of international specialists in order to address this shortcoming of the Human Rights Council Resolution 5-2/1 describing the Lebanon Commission's tasks.

<sup>59</sup> United Nations, General Assembly, *Report of the Commission of Inquiry on Lebanon*, cit., pp. 35-36.

<sup>60</sup> Israel Ministry of Foreign Affairs, *Hizbullah's Exploitation of Lebanese Population Centers and Civilians: Photographic Evidence*, available at [www.mfa.gov.il](http://www.mfa.gov.il) (consulted on 30 May 2008).

<sup>61</sup> United Nations, General Assembly, *Report of the Commission of Inquiry on Lebanon*, cit., para. 26, p. 6, and also *Why They Died...*, cit., pp. 52-61.

there are many documented incidents so as to leave us with no doubt about the unwillingness of the IDF to respect its obligations and the common conclusion of all the independent inquiries undertaken is that Israel carried out indiscriminate and direct attacks against civilians and that it systematically failed to respect the principle of proportionality<sup>62</sup>.

Some of the greatest impacts of the Israeli military operations during the war was the massive destruction of civilian houses. The estimations of the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) refer to more than 15,000 houses being destroyed, an impressive figure for a war that lasted only 33 days. According to the same agency the full extent of the destruction was not possible to be assessed at that time and thus the total numbers of damaged and destroyed houses should be greater<sup>63</sup>.

Very interesting are the findings concerning the targeted areas. Most of the destroyed houses were south to the Litani River, an area Israel declared to be populated by terrorists. Most of the villages inside that area were targeted and sustained extensive damages, in some cases up to 80% of their buildings<sup>64</sup>. All the available reports agree that there was no military target or military necessity. The destruction of the houses had an indiscriminate and punitive nature: the people on those areas were punished just for living there<sup>65</sup>.

The findings leave little room for quarrel, the premeditated manner of the destruction of the houses was a form of collective punishment towards the Shia population and the Lebanese population in general.

### *The Blockade against Lebanon*

Alongside with the commencing of airstrikes and the bombardment, Israel imposed a strict air and naval blockade to Lebanon. More specifically, on 13 July Israeli warships moved inside the Lebanese territorial waters in order to seal the country's ports and harbors. The following days Israel's air forces imposed an air blockade in order to cut off Lebanon completely. Moreover, Israel bombers targeted the runways and the fuel tanks of the only international airport of the country, rendering it unusable for any purpose. The Israel's justification for this complete blockade was that it was necessary in order to cut off the supplies to Hezbollah<sup>66</sup>.

<sup>62</sup> See United Nations, General Assembly, *Report of the Commission of Inquiry on Lebanon*, cit., pp. 28-36; *Fatal Strikes, Israel's Indiscriminate Attacks Against Civilians in Lebanon*, in «Human Rights Watch», vol. 18, 2006, pp. 14-37; see also Amnesty International, *Israel/Lebanon: Out of All Proportion - Civilians Bear the Brunt of the War*, pp. 28-45 AI Index: MDE 02/033/2006 available at <http://report2007.amnesty.org/document/231> (consulted on 3 May 2008).

<sup>63</sup> United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *Media Factsheet on Lebanon - 16 August 2006*, available at <http://www.reliefweb.int> (consulted on 30 May 2008).

<sup>64</sup> According to the UNIFIL reports of 15 and 16 August 2008, available at <http://www.reliefweb.int/rw/rwb.nsf/db900SID/EGUA-6SQMXZ> (consulted on 30 May 2008).

<sup>65</sup> Amnesty International, *Israel/Lebanon: Out of All Proportion...*, cit. See also *Fatal Strikes...*, cit., pp. 14-15, and United Nations, General Assembly, *Report of the Commission of Inquiry on Lebanon*, cit., para. 319, p. 71.

<sup>66</sup> H. Fattah, S. Erlanger, *Israeli Forces Blockade Lebanon*, in «International Herald Tribune», 17 July 2007, available at <http://www.iht.com/articles/2006/07/13/news/mideast.php> (visited on 29 May 2008).

Under the law of armed conflicts these kinds of blockades are not illegal *per se*. It is also undeniable that in general, installations like airports and ports can be military assets contributing to the strength of the adversary. It is often contested whether Hezbollah could really use the airport but this is a more or less hypothetical question that requires hypothetical answers this research cannot provide. What can be under investigation though are the nature and the intensity of this blockade with regard to the impact to the population.

It was generally acknowledged that the strictness of the Israeli blockade had an extremely negative effect to the relief aid, severely limiting the access to humanitarian assistance to those in need. It is an obligation imposed by the IHL to the parties of the conflict, not to obstruct and facilitate the humanitarian assistance<sup>67</sup>. All humanitarian assistance agencies faced tremendous difficulties fulfilling their mission because of the blockade; among the ones to raise their concerns were many United Nations agencies and the Red Cross. Without doubt the difficulties those agencies faced in order to provide relief was the cause of many civilian casualties that might have been spared otherwise<sup>68</sup>.

The cost of the blockade was enormous for the economy of Lebanon, and among others prevented the cleaning of the coast from the big oil spill over in Jiyeh, a fact that will have negative effect on the fishing and tourism activities for years, not to mention the damage in the archaeological site of Byblos. The exact impact of the blockade in the economy of Lebanon is hard to be estimated. Nevertheless, all assessments agree that the suffocating blockade had a tremendous impact on civilians and the economy of the country and the full range of this negative legacy is not yet visible in its full range but will plunder the people of Lebanon for the decades to come<sup>69</sup>.

As mentioned earlier the employment of blockade is a usual tactic and not illegal as such. What was problematic in this case was the strictness and inflexibility of the blockade. It should have been employed in a more flexible way in order to meet with the obligations under IHL and take into consideration the humanitarian aspects. According to the Commission of Inquiry on Lebanon:

[...] the impact of the blockade on human life, on the environment

<sup>67</sup> *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, cit., Article 23.

<sup>68</sup> The obstacles the humanitarian assistance encountered as well as the official reaction to those obstacles, were documented among others in the report of the Commission of Inquiry in Lebanon (p. 63) and a good *in situ* view during the conflict is provided in *Nouveau Droits de l'Homme / ALEF, International Humanitarian Law Violations in the Current Conflict Opposing Hezbollah (Lebanon) to the State of Israel*, August 2006, p. 9.

<sup>69</sup> For an independent and comprehensive effort for accurate estimations see H. Sayed, Z. Tzannatos, *The Economic and Human Costs of War*, in *The War in Lebanon, A Reader*, Olive Branch Press, Boston, 2008, pp. 316-348.

and on the Lebanese economy seems to outweigh any military advantage Israel wished to obtain through this action. The Commission finds that the blockade should have been adapted to the situation on the ground, instead of being carried out in a comprehensive and inflexible manner that resulted in great suffering to the civilian population, damage to the environment, and substantial economic loss<sup>70</sup>.

The impact and severity of the Israeli blockade provoked the reaction of the international community. The European Union, through its Finnish presidency, condemned immediately the blockade, as unjustified. Similar was the position of the EU Commissioner for Development and Humanitarian Aid, Louis Michel, in meetings he held with Israeli officials<sup>71</sup>. The United Nations condemned the blockade as well. The Secretary-General Mr. Kofi Annan, in a delayed response to the situation, alarmed by the effects and illegality of the blockade, urged Israel to lift it in order «not to be seen as collective punishment of the Lebanese people»<sup>72</sup>. Unfortunately, Israel did not lift the blockade until the 7 of September, almost a month after the UN Security Council resolution and the subsequent cease-fire, aggravating an already difficult situation.

<sup>70</sup> United Nations, General Assembly, *Report of the Commission of Inquiry on Lebanon*, cit., para. 275, p. 64.

<sup>71</sup> General Affairs and External Relations, *Presidency Statement on the Recent Developments in Israel and Lebanon*, 13 July 2006, available at [http://www.eu2006.fi/news\\_and\\_documents](http://www.eu2006.fi/news_and_documents). Similar position held countries like France, Russia and others.

<sup>72</sup> UN News Service, *Annan Says Israeli Blockade of Lebanon Must Not Be a «Collective Punishment»*, 31 August 2006, available at <http://www.un.org/apps/news/story.asp?NewsID=19688&Cr=Leban&Cr1> (visited on 1 June 2008).

<sup>73</sup> See Government of Lebanon Higher Relief Commission, Report No. 25 available at [www.reliefweb.int/rw/rwb.nsf/db900SID/EK0I-6ST5ZM?OpenDocument](http://www.reliefweb.int/rw/rwb.nsf/db900SID/EK0I-6ST5ZM?OpenDocument) (visited on 21 June 2008).

### *Attacks on Infrastructure*

An issue particularly important with regard to collective punishments and one of the main reasons for the criticism concerning Israel's campaign is the damage inflicted upon the Lebanese infrastructure and the installations indispensable to the survival of the population. Places of worship and the cultural heritage of Lebanon were damaged too.

It is estimated that 109 bridges and 137 roads (more than 445,000 sq. km) were destroyed or damaged during the conflict and that more than 25 fuel stations and around 900 commercial enterprises (factories, markets, farms and medium size enterprises, etc.) were hit<sup>73</sup>. Among the targets attacked were the port of Beirut, the modern lighthouse of Beirut and the five runways and the fuel tanks of the International Airport of Beirut. According to the government of Lebanon 31 «vital points» (airports, ports, water and sewage treatment plants, electrical plants, water dams, etc.) of the country's infra-

structure were destroyed or damaged by the IDF<sup>74</sup>.

The number of residential properties, offices and shops completely destroyed exceeds 30,000 and two government hospitals – in Bint Jbeil and in Meis al-Jebel – were completely destroyed in Israeli attacks while three others were seriously damaged<sup>75</sup>. The Commission of Inquiry documented several incidents of attacks against water facilities and attempts by the IDF to control the water flow. The media communication infrastructure was systematically and indiscriminately targeted as well, a pattern condemned by the International Federation of Journalists<sup>76</sup>.

The economic infrastructure appears to have been a major concern of the IDF. According to the available data 127 factories producing commodities like milk (*Liban Lait*), glass (*Maliban*), plastics, medical supplies and many others were hit by the IDF. The factories were directly targeted and were not collateral damages<sup>77</sup>. In addition, many hectares of cultivated land and crops were deliberately burned and the agricultural section of the economy was particularly harmed (especially in Southern Lebanon); due to the hostilities the touristic season was lost too<sup>78</sup>.

The reasoning behind the IDF attacks to the most critical Lebanese infrastructure is related to the military use of such installations by Hezbollah. In the official publication of the Israeli Ministry of Foreign Affairs concerning the conduct of the IDF, we find out that indeed the aim of the attacks was to hinder the operational capabilities of Hezbollah: «The guiding principle adopted by the IDF was to target only infrastructure that was making a significant contribution to the operational capabilities of the Hizbullah terrorists»<sup>79</sup>, and continues describing the test performed by IDF before engaging a target: «whether they make an effective contribution to an adversary's military action so that their capture, destruction or neutralization offers a definite military advantage in the circumstances ruling at the time»<sup>80</sup>.

Even if declared, the above principles, in line with the IHL, were not observed during the conflict. It is true that some of the targets could, under certain conditions, qualify as military or seen as having «dual use». For the case of the airport the justification was that it was attacked in order to block the supply of the terrorists and due to the information that

<sup>74</sup> *Ibidem*.

<sup>75</sup> Amnesty International, *Israel/Lebanon: Deliberate Destruction or «Collateral Damage»?», August 2006, p. 26, AI Index: MDE 18/007/2006.*

<sup>76</sup> United Nations, General Assembly, *Report of the Commission of Inquiry on Lebanon*, cit., paras. 138-142, p. 37.

<sup>77</sup> Nouveau droits de l'Homme / ALEF, *International Humanitarian Law Violations in the Current Conflict Opposing Hezbollah (Lebanon) to the State of Israel*, Second Report, 2006, p. 8, available at <http://www.lebanonunder siege.gov.lb/Documents/NDH-ALEFIHViolationsSecondreport.pdf> (visited on 14 June 2008).

<sup>78</sup> *Ibidem*, paras. 144-146, p. 38. See also Amnesty International, *Israel/Lebanon: Deliberate Destruction...*, cit., p. 11.

<sup>79</sup> Israeli Ministry of Foreign Affairs, *Preserving Humanitarian Principles While Combating Terrorism: Israel's Struggle with Hizbullah in the Lebanon War*, in «Diplomatic Notes», no. 1, 2007, p. 15, available at [www.mfa.gov.il/NR/rdonlyres/74D04C9D-FA73-4A54-8CBA-DBCB1152C82E/0/DiplomaticNotes01.pdf](http://www.mfa.gov.il/NR/rdonlyres/74D04C9D-FA73-4A54-8CBA-DBCB1152C82E/0/DiplomaticNotes01.pdf).

<sup>80</sup> *Ibidem*, p. 16.

<sup>81</sup> The Commission of Inquiry on Lebanon holds the view that under the information provided, the Hezbollah affiliated Al-Manar TV station was not a legitimate military target. Similar concern was expressed by Amnesty International. See United Nations, General Assembly, *Report of the Commission of Inquiry on Lebanon*, cit., para. 142, p. 38. For the legitimacy of the TV stations as military targets see also *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, paras. 71–79, available at <http://www.un.org/icty/pressreal/natoo61300.htm#IVB3> (consulted on 2 June 2008).

<sup>82</sup> Israeli Ministry of Foreign Affairs, *Preserving Humanitarian Principles While Combating Terrorism...*, cit., p. 15.

<sup>83</sup> See among others Amnesty International, *Israel/Lebanon: Out of All Proportion...*, cit., also *Why They Died...*, cit., and B'Tselem, *Lebanon and Northern Israel*, 23 July 2006, available at [http://www.btselem.org/english/special/20060723\\_Lebanon.asp](http://www.btselem.org/english/special/20060723_Lebanon.asp) (consulted on 2 June 2008).

<sup>84</sup> United Nations, General Assembly, *Report of the Commission of Inquiry on Lebanon*, cit., para. 148, p. 39.

<sup>85</sup> The latest estimated figures are as much as four times higher compared to the initial estimation of one million bombs reported to the Commission of Inquiry. New evidence also shows that Israel used an unknown number of anti-personnel land mines in undisclosed locations. See UN Mine Action Coordination Center South Lebanon, *Situation Report*, 31 October 2006, available at <http://www.maccsl.org/reports/Sitreps/Sitreps%2013%20Sep.pdf> (visited on 3 June 2006). Israel claims that it has provided with maps but UN officials in Lebanon say the maps are useless and they charge that Israel refuses to turn over more precise information. See M. Slackman, *Left in Lebanon: A Million Bomblets*, available at

Hezbollah was planning to smuggle the captured soldiers out of the country. The same arguments were used for attacking the ports of the country. Moreover, if for some the issue of TV installations is debatable because for example it could be tools in the hands of the enemy, and thus the attack against the TV facilities of Hezbollah was legitimate as military target, the attack on every TV channel goes beyond any military necessity<sup>81</sup>.

No matter how willing is one to agree with the Israeli views, it is impossible not to wonder what was the military necessity behind the targeting of milk factories; the bombing of the modern lighthouse of Beirut while the port was under strict blockade; the burning of crops; the destruction of small shops, banks, religious sites and many more, especially if one bears in mind that the initial aim of the operation was to free the captured Israeli soldiers. Unfortunately, the Israeli Ministry of Foreign Affairs did not provide with any answers. This should not come as a surprise, as in the latter publication we also find the view of Israel towards the damage inflicted on the Lebanese infrastructure:

Most of the other infrastructure (medical, cultural, railroad, tunnels, ports, banking, manufacturing, farming, tourism, sewage, financial, electricity, drainage, water and the like) was left almost completely untouched<sup>82</sup>.

A totally different reality compared to findings presented by all the independent reports, the reports of the UN Commission of Inquiry and the other UN agencies<sup>83</sup>, while the Commission of Inquiry on Lebanon stated it was «convinced that the damage inflicted to some infrastructure was inflicted for the sake of damage»<sup>84</sup>.

### *The Use of Cluster Munitions*

It is impossible to examine the 2006 war in Lebanon without referring to the issue of the cluster bombs dropped by Israel. These cluster munitions are truly the «lethal legacy» to the Lebanese society. The UN Mine Action Coordination Center South Lebanon (UNMACC) estimates that one million bombs remained on the soil after the end of the war<sup>85</sup>. For comparison, coalition forces used about 1.9 million sub-

munitions in Iraq in 2003, and the U.S. Air Force used about 248,000 submunitions in Afghanistan in 2001-2002<sup>86</sup>. This comparison is revealing of the magnitude of the issue. Always according to the UNMACC, unexploded submunitions are killing or injuring an average of three people daily in Lebanon and a big percentage of the casualties are children<sup>87</sup>.

The use of cluster munitions is not illegal *per se* according to IHL. It is true that due to the lack of precision of the weapon and the complex situation a military commander may face especially when fighting in a populated terrain, the applicability of the principle of distinction becomes harder. The Israeli position is that there was no violation of international law concerning the use of cluster munitions in Lebanon. The Israeli Military Attorney General in his decision of 24 December 2007 held the view that the use of the weapons was according to the applicable humanitarian law standards. Their use was against military targets and served strict military necessity and «most cluster munitions were fired at open and uninhabited areas, areas from which Hizbullah forces operated and in which no civilians were present», while he continues that «the IDF had to make use of weaponry which allowed for an immediate response to rocket fire while providing maximum coverage within the targeted area»<sup>88</sup>. Finally, he decided not to take any action against the cases where deviations from the orders took place.

The millions of remaining cluster bombs have considerable impact to the economy. Many farmers have not been able to harvest current crops or plant their winter crop due to the submunition contamination and the UN Special Rapporteur on the Right to Food expressed his concerns on the long term of the unexploded ordnance on the livelihoods of hundred thousands of people<sup>89</sup>. The psychological impact on children was considerable as well. Moreover, one of the most striking aspects of the use of cluster munitions by the IDF, and of the whole war, is that according to the UNMACC, a figure later verified by the OCHA, around 90 percent of all cluster munitions were fired into Southern Lebanon during the last 72 hours of the conflict, while the cease-fire was brokered<sup>90</sup>.

Taken into account the indiscriminate manner and the lack of any reasonable justification by the IDF, it is clear that no military advantage could be conferred by flooding the

<http://www.iht.com/articles/2006/10/05/news/cluster.php?page=1> (visited on 2 June 2008).

<sup>86</sup> *Flooding South Lebanon Israel's Use of Cluster Munitions in Lebanon in July and August 2006*, in «Human Rights Watch», vol. 20, no. 2(E), 2008, p. 38.

<sup>87</sup> *Ibidem*, see also UN Mine Action Coordination Center South Lebanon, *Annual Report 2007*, available at <http://www.maccsl.org/reports.htm>.

<sup>88</sup> Israel Ministry of Foreign Affairs, *Opinion of the Military Advocate General Regarding Use of Cluster Munitions in Second Lebanon War*, 24 December 2007, available at <http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings> (consulted on 6 June 2008).

<sup>89</sup> The UN Special Rapporteur on the Right to Food Jean Ziggler, quoted in Amnesty International, *Israel/Lebanon: Out of All Proportion...*, cit., p. 58.

<sup>90</sup> UN Mine Action Coordination Center South Lebanon, *A Lasting Legacy: The Deadly Impact of Cluster Bombs in Southern Lebanon*, available at [http://www.mineaction.org/downloads/1/OCHA\\_lasting%20legacy.pdf](http://www.mineaction.org/downloads/1/OCHA_lasting%20legacy.pdf). The fact was verified by the Commission of Inquiry on Lebanon during interviews with IDF staff, revealing dishonoring tactics by the IDF. See United Nations, General Assembly, *Report of the Commission of Inquiry on Lebanon*, cit., para. 251, p. 59.

Southern Lebanon with cluster bombs and this is the opinion of every available report<sup>91</sup>. The question then remains: what was the aim of the IDF? According to the Commission of Inquiry the action of the IDF was premeditated and the aim was to harm the civilian population by turning large areas of fertile land into no-go areas and harm the economy and wellbeing of the inhabitants<sup>92</sup>. The statement of the head of an IDF rocket unit is illustrative: «What we did was insane and monstrous; we covered entire towns in cluster bombs»<sup>93</sup>.

## 2.4. The Impact of the Attacks

Even though an extensive coverage of the economic loss due to the war cannot be done here, a few remarks are important as the impact of the attacks in the infrastructure of Lebanon was tremendous according to all independent observers. The estimates vary according to the nature of the assessment and whether the long-term implications are included. The Lebanese government gave an initial estimation of 3.6 billion US dollars but the figures were revised to higher amounts soon and the UN Development Program estimated the total damage to 15 billion US dollars<sup>94</sup>. The Economist Intelligence Unit characterized the effects on the economy as enormous, pointing out that there will be long term effects that are hard to estimate now<sup>95</sup>. Considerable were the implications in unemployment and the GDP, even though the estimations that the GDP will fall by 10% in 2006 were not proven accurate, mainly due to the external support the country received<sup>96</sup>. Any country which has sustained such an extensive damage would be under severe pressure but given the economic and the political context of Lebanon, the effects seem even greater to the well-being of its people. If the aim was «to bring the clock of Lebanon 20 years behind»<sup>97</sup> as the Israel's Chief of Staff, Lt. Gen. Dan Halutz declared on the eve of the operation, then the mission should be considered accomplished.

## 3. The Appraisal of the Facts

### 3.1. Should the Conduct of Israel Be Regarded as Collective Punishment? – A Legal Appraisal

As noted earlier there is a lot of controversy regarding the

<sup>91</sup> *Why They Died...*, cit., p. 12; Amnesty International, *Israel/Lebanon: Out of All Proportion...*, cit., pp. 55-59. See also United Nations, General Assembly, *Report of the Commission of Inquiry on Lebanon*, cit., paras. 249-256, pp. 58-60.

<sup>92</sup> *Ibidem*, paras. 252 and 256, p. 60.

<sup>93</sup> R. Meron, *IDF Commander: We Fired More Than a Million Cluster Bombs in Lebanon*, available at <http://www.haaretz.com/hasen/spages/761781.html> (visited on 2 June 2008).

<sup>94</sup> H. Sayed, Z. Tzannatos, *The Economic and Human Costs of War*, cit., p. 338.

<sup>95</sup> Economist Intelligence Unit, *Lebanon: Economic Background, 2006*.

<sup>96</sup> An estimation of the damage by each sector of the economy was provided by United Nations, General Assembly, *Report of the Commission of Inquiry on Lebanon*, cit., paras. 295-313, pp. 68-71; for updated figures see H. Sayed, Z. Tzannatos, *The Economic and Human Costs of War*, cit., *passim*.

<sup>97</sup> E. Labott, *Israel Authorizes «Severe» Response to Abductions*, in «CNN International», 13 July 2006, available at <http://www.cnn.com> (consulted on 18 May 2008).

nature of the conflict and especially concerning the role of Hezbollah. The situation is more complicated if it's accepted that a non-international armed conflict took place alongside the international one. However, the question here is whether the conduct of Israel was a collective punishment against the total of the Lebanese people and the Lebanese state; therefore it relies predominately on the law governing the international conflict which, without doubt, took place in the summer of 2006 in Lebanon.

If we take a look at the relevant reports, we will find some diversion. The report of the Commission of Inquiry on Lebanon clearly qualifies much of the conduct of Israel as collective punishment and attributes particular importance to the deliberation of the attacks against a wide range of civilian targets that served no military purpose<sup>98</sup>. Of course, the findings of the Commission were perceived very negatively by Israel and the report itself was condemned as impartial, but no reply was given to the issues raised in it, including the allegation of collective punishment<sup>99</sup>.

As far as the NGOs who performed relevant research on the ground are concerned, «Human Rights Watch» in none of its reports qualified the conduct as collective punishment, even though in numerous occasions it has pointed out similar concerns as those expressed by the Commission of Inquiry. Amnesty International in its initial report does not refer to collective punishment, even if it deals mainly with the damage on infrastructure and the collateral damage; in its second and more comprehensive report though, it does qualify some of the Israeli conduct as collective punishment, a view that reiterates in its Annual Report of 2007<sup>100</sup>. The Israeli human rights NGO B'Tselem expressed some concerns about collective punishments but not straightly qualified the conduct as such<sup>101</sup>, while both the NDH/ALEF and the American-Arab Anti-Discrimination Committee Research Institute do not refer to collective punishment at all.

In order to reach a conclusion some remarks are necessary. To start with the civilian casualties, it is a firmly established fact that IDF made an indiscriminate, disproportionate and excessive use of its military force. The conduct of IDF caused a lot of civilian casualties and great devastation to the Lebanese economy and society. Israel describes these effects as «collateral

<sup>98</sup> United Nations, General Assembly, *Report of the Commission of Inquiry on Lebanon*, cit., para. 331, p. 73.

<sup>99</sup> See the statement of Israel in the Human Rights Council; similar was the position of the United States. United Nations Office at Geneva Press Release, *Human Rights Council Discusses the Report of the Commission of Inquiry on Lebanon*, available at <http://www.unog.ch> (consulted on 3 June 2008).

<sup>100</sup> «These attacks seem to have been aimed at inflicting a form of collective punishment on Lebanon's people [...]». Amnesty International, *Israel/Lebanon: Out of All Proportion...*, cit. See also *Amnesty International Report 2007*, p. 147, available at <http://report.2007.amnesty.org/document/231>.

<sup>101</sup> B'Tselem, *Lebanon and Northern Israel*, cit.

damage» caused by attacks to legitimate targets. To put it on the official Israeli words:

Hizbullah's deliberate placing of missile launchers and stockpiles of weapons in the heart of civilian centers, frequently inside and beneath populated apartment blocks, meant that this risk was tragically high. The possibility of collateral injury to civilians must be weighed in light of these considerations<sup>102</sup>.

The findings, however, do not sustain the Israeli claims. Most of the allegations of Israel were found to be false, especially the ones claiming that Hezbollah was systematically using human shields, blocking the escape of civilians and storing weapons in civilian buildings. Even if in some isolated cases the allegations were true, by no means could the scale of civilian casualties and devastation be justified. As described before, there were so many cases that no military necessity, even in its widest possible sense, could advocate for the attacks, not to mention the direct and repetitive attacks on civilian objects, civilians themselves<sup>103</sup>, and the lethal legacy of the cluster munitions.

All observers and findings agree that the impact of those attacks was tremendous. What is most important here is that those attacks were of a great magnitude, carried out in an orchestrated manner and that they harmed almost every aspect of the Lebanese infrastructure and had a collective negative effect on the lives of the Lebanese people, while they offered no concrete military advantage to the Israeli army. The conduct of Israel affected predominately and almost exclusively the Lebanese people who were innocent of decision of Hezbollah to abduct Israeli soldiers or to carry out rocket attacks to civilian targets inside Israel. No matter the intentions of the individual commanders or pilots, etc. The potential criminal responsibility under international law is not under investigation here: even if one agrees that their intention was not to cause such collective harm, the effects of their conduct were such that the whole population suffered greatly.

### *Collective Punishment not Reprisals*

What is particularly driving the qualification of the conduct towards the establishment of a tactic of collective punishment is the attacks on the Lebanese infrastructure and economy and

<sup>102</sup> Israeli Ministry of Foreign Affairs, *Preserving Humanitarian Principles While Combating Terrorism...*, cit., p. 14.

<sup>103</sup> A striking example of attacks against civilians that caused outrage was the attack in Qana. See *Why They Died...*, cit., p. 52, and also D. Turns, *Some Reflections on the Conflict in Southern Lebanon...*, cit., pp. 177-209.

the extent of this attack. The documentation and analysis of those attacks as well as their often premeditated nature strongly sustains the allegation that the destruction of civilian houses, factories, power and water installations, and the damage caused to cultural and historical sites and all kinds of critical infrastructure, were serving no military purpose and were made for the sake of destruction. In addition, the comprehensive and strict blockade, with its huge repercussions on the economy, is another incriminatory element, especially as it lasted for almost one month after the end of the hostilities.

It is also very important to understand that the attacks were not reprisals to certain actions of Hezbollah, but the very nature of the attacks reveals the intention of the state of Israel to heavily sanction the state of Lebanon and its population. The distinction among reprisals and collective punishments should be clear for once more, as the target of the attacks was not the initial author of the violation (Hezbollah according to Israel) but rather the Lebanese people and society as such. What the Lebanese people suffered was an act of punishment by the state of Israel; the inflammatory and terrorizing language used by Israel in every occasion during the conflict was conducive to this end. Therefore, given the nature of the IDF targeting and its cumulative effects on the Lebanese state and population as a whole, we should qualify such conduct as a form of collective punishment inflicted to the totality of the Lebanese people. Moreover, even if possible individual criminal responsibility is kept aside, Israel's state responsibility should be certainly invoked. It is sad that, despite the many calls to do so, the most important commission that Israel has set up in order to deal with the war in Israel chose not to address the issue of the alleged war crimes by the IDF<sup>104</sup>.

### **3.2. Beyond International Law. «Those in Favour of Collective Punishments Raise Your Hand»**

The collective punishment is clearly illegal under international law. Even if Israel, but not only Israel of course, uses systematically this tactic to combat its adversaries, one will never hear any official statement admitting it and even less justifying it. The justification provided for suspicious tactics always refers to the need to protect the security of the population and of the state in general, while fiercely denying that the conduct

<sup>104</sup> See for example Amnesty International, *Israel: Winograd Commission Disregards Israeli War Crimes*, 31 January 2008, available at [http://www.amnesty.org.uk/news\\_details.asp?NewsID=17631](http://www.amnesty.org.uk/news_details.asp?NewsID=17631) (consulted on 17 June 2008).

amounts to collective punishment. However, the tactic is there and even if no official dares to justify it, some academics and journalists bear that burden.

A prime example is the United States Court of Appeals Judge and Academic Richard Allen Posner. In some of his recent articles concerning the war in Lebanon and the general conduct of Israel he clearly takes sides with Israel. He argues that collective punishment is not only necessary for Israel but it is also justifiable. He draws his arguments from the economic science (cost-effect theories) and the domestic law concerning the liability of the employer for acts of his employees<sup>105</sup>. In the case of Lebanon, he considers the whole Lebanese nation as responsible and he wonders and provides an answer as well:

But how do you «punish» a nation? The nation is the collective of its citizens. Punishing the nation means punishing its citizens even if there is nothing they can do or could ever have done to prevent the actions for which they are being held responsible.

It is sad indeed to hear these words from leading academics and high ranking judges. Connecting international law values with economic and statistical sciences is really inappropriate. Even worst is associating the liability of employers for faults of the employees with the collective responsibility of a nation while admitting there is nothing that the population could have done<sup>106</sup> and knowing that the stake here is not just money, but thousands of innocent lives and incredible suffering. Judge Posner finishes its article even more cynically: «This may be in the punisher's interest: if Lebanese flee southern Lebanon so as not to be “collectively punished” for the acts of Hezbollah, Israel will have a freer hand in dealing with Hezbollah there»<sup>107</sup>.

Judge Posner is not alone in his justification of Israel's war crime. For example Richard Cohen, a leading «Washington Post» columnist and two times honorable-mention winner in Pulitzer Prize competitions, believes that for Israel proportionality is not only inapplicable, it is suicide and reassures that: «Anyone who knows anything about the Middle East knows that proportionality is madness»<sup>108</sup>. Of course there are many such examples, but these two, by leading figures of

<sup>105</sup> R.A. Posner, *Collective Punishment*, 23 July 2006, available at <http://www.becker-posner-blog.com/archives/2006/07/collectivepunishment.html> (consulted on 9 June 2008).

<sup>106</sup> *Ibidem*.

<sup>107</sup> *Ibidem*.

<sup>108</sup> R. Cohen, ... *No, It's Survival*, in «The Washington Post», 25 July 2006, p. A15, available at <http://www.washingtonpost.com> (visited on 9 June 2008).

the judicial and media stratum, are simply to illustrate that the notion of justice and law is not the same for everybody and it is always good to bear that in mind in any effort to analyze a situation and understand the motives of its actors.

### 3.3. Do Collective Punishments Work?

If one of the aims of Israel was to turn the population against Hezbollah, then every independent observer agrees that at least this part of the operation was a flamboyant failure. Hezbollah managed to profit not only in military but also in political terms of the 2006 conflict, especially in order to consolidate its position within the Lebanese society. According to every research conducted after the end of the war, the Hezbollah support within the whole Lebanese society has risen considerably while even those opposed to the organization have recognized and hailed its role<sup>109</sup>. The most important element of these surveys is probably the fact that Israel's attack managed to unify the Lebanese society and give a boost to the approval of Hezbollah across the society. It is certain that the massive rise in popularity was the effect of the war and probably will not last for too long, but still everybody in Lebanon and not only there agrees that in general Hezbollah has gained a lot of confidence points within the Lebanese society. Maybe Israel thinks that the tactics has served well on previous occasions, but this time collective punishment and terrorization did not work. This should be a valuable lesson for the years to come and especially with regard to the case of Palestine and the Occupied Territories where unfortunately and beyond doubt collective punishments has been implemented for many years now<sup>110</sup>, even if the two cases have many differences but also striking similarities both from a legal and a political point of view.

<sup>109</sup> For a collective account of many surveys conducted by different institutions that reach similar conclusions see *Lebanese Public Opinion*, in «Mideast Monitor», vol. 1, no. 3, September–October 2006.

<sup>110</sup> See for example *Militant Attacks Cannot Justify Unlawful Collective Punishment*, in «Human Rights Watch», Jerusalem, 23 December 2005, available at <http://www.hrw.org/english/docs/2005/12/22/isrlpa12345.htm> (visited on 8 June 2008); Amnesty International, *Israel/Occupied Territories: Demolition of Houses is an Act of Collective Punishment*, 14 January 2002, AI Index MDE 15/005/2002; B'Tselem, *Gaza One Big Prison*, available at [http://www.btselem.org/Download/200705\\_Gaza\\_Insert\\_Eng.pdf](http://www.btselem.org/Download/200705_Gaza_Insert_Eng.pdf) (consulted on 5 June 2008).

## Conclusion

If we look at the Middle East and especially at the conflicts of Israel in Palestine and the Occupied Territories as well as the Lebanon, it seems that collective punishment tends to become a pattern in order to deal with the adversaries; furthermore, similarities between Hamas and Hezbollah cannot be easily

overlooked. Israel is facing grave threats by terrorist or non-terrorists groups and has indeed the right to respond collectively, as a society, to them. This, however, should not be done on the expense of the innocent because, and given the strength of Israel's military power, there is the risk that its practices will end up as state terrorism. Moreover, and in the broader context of the conflicts around the world, one cannot fail to notice that there is a recurrent shift from the reprisals to collective punishments. It is also true that depending on the view taken upon the issues, political or legal, there can be many and diverse interpretations of the facts. As a final remark, it should be stressed that we, the individuals or the international community, should never forget that both practices are forbidden against protected persons and objects. What is probably the most important is to always allow the humane and humanitarian values guide us, alongside with justice and law. Such an understanding is the cornerstone in order to overcome any utilitarianism in the political deliberation – and spare the innocent.